No. 01-705, 01-715

Supreme Court, U.S.
JUL 22 2002
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In the Supreme Court of the United States

JO ANNE B. BARNHART, Commissioner of Social Security,
Petitioner,

v.

PEABODY COAL COMPANY, *et al.*

MICHAEL H. HOLLAND, *et al.*, as Trustees of the United Mine Workers of America Combined Benefit Fund,
Petitioners,

v.

BELLAIRE CORPORATION, *et al.*

On Writs of Certiorari to the United States Court of Appeals For the Sixth Circuit

REPLY BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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REPLY BRIEF FOR PETITIONERS THE TRUSTEES OF THE UMWA COMBINED BENEFIT FUND

Most noteworthy in respondents' briefs are the arguments that are missing:

- Respondents acknowledge (for present purposes, at least) that all of the beneficiaries at issue *should* have been assigned to them under the statutory criteria set forth in Section 9706(a) of the Coal Act, 26 U.S.C. § 9706(a). The challenged assignments, in other words, are exactly what Congress intended them to be.

- Respondents do not argue that their financial burden is any greater because the assignments at issue were made after October 1, 1993, rather than before. The health care premiums that respondents are being asked to pay are thus exactly the premiums that Congress intended them to pay.

- Respondents do not suggest that Congress was indifferent on the question whether Combined Fund beneficiaries were assigned or were left unassigned. To the contrary, it is uncontested that Congress wanted as many beneficiaries as possible to be assigned to specific former employers (or related persons to such employers) and to leave as few beneficiaries as possible unassigned.

- Respondents, though they wave the "plain meaning" banner, point to no statement in the Coal Act declaring that the Commissioner is prohibited from making initial assignments after October 1, 1993, or that any such assignments are invalid, or that any beneficiaries not assigned before October 1, 1993 must be considered forever unassigned. In fact, Congress included no such provision in the statute, although it would have been easy to do so if Congress had intended to produce the result that respondents advocate.

The absence of all the foregoing arguments is not accidental. Rather, it is symptomatic of the fundamental flaws in respondents' position. The central feature of the Coal Act is a congressional decision to replace a contractual system based on the collective responsibility of all participating employers with a statutory system based on the individual responsibility of specific former employers to which particular retirees are assigned. Respondents' position seeks to undermine this basic legislative choice and to subordinate it to the allegedly overriding imperative of administrative adherence to a single statutory date. None of the arguments that respondents advance supports this topsy-turvy outcome.

I. THE WORD "SHALL" IS NOT DISPOSITIVE.

Bellaire's first line of argument focuses on the word "shall" in Section 9706(a). "Shall means shall," Bellaire lectures, and the word is mandatory, not discretionary. Citing a number of unrelated cases involving the word "shall," Bellaire attempts to persuade the Court that the very character of the word is enough to divest the Commissioner of the authority to act after September 30, 1993.

But none of the cases on which Bellaire relies concerned the power of a government agency to perform its statutorily assigned tasks after a date by which Congress wanted the work to be complete.[1/] The issue is not whether

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1/ *See, e.g., Anderson v. Yungkau,* 329 U.S. 482, 485-86 (a civil case "shall" be dismissed against decedent under Fed. R. Civ. P. 25(a) if substitution not made within two years); *United States v. Monsanto,* 491 U.S. 600 (1989) (criminal defendant who is convicted "shall" forfeit property related to the crime); *Lopez v. Davis,* 531 U.S. 230, 241 (2001) (Bureau of Prisons "shall" provide residential substance abuse treatment to prisoners); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26 (1998) (Judicial Panel on Multidistrict Litigation "shall" remand pending case to originating court at or before conclusion of pretrial proceedings); *Miller v. French,* 530 U.S. 327 (2000) (motion to terminate

"shall" is mandatory, but what Congress intended to happen if SSA were unable to complete the initial assignment process before October 1, 1993. Acknowledging "shall" as the "language of command" does not determine the result if and when the command is not followed. Congress may command that an agency "shall" issue regulations by a given date, yet no one would contend that failure to complete the task on time should preclude the agency from performing its statutory obligation. Similarly here, Congress directed that the Commissioner "shall" assign Combined Fund beneficiaries before October 1, 1993, but the agency's inability to complete the task by the specified date did not mean that the task should be abandoned.

If there were any doubt that the word "shall" cannot bear the weight that respondents would give it, that doubt is removed by this Court's decisions in *Brock v. Pierce County*, 476 U.S. 253 (1986), *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990), *United States v. James Daniel Good Real Prop.*, 510 U.S. 43 (1993), and *Regions Hosp. v. Shalala*, 522 U.S. 448 (1998). All of these cases involved statutes that, using the word "shall," directed the government or one of its agencies to perform certain acts within a specified time period or by a specified date. In *Pierce County*, for example, the Comprehensive Employment and Training Act provided that the Secretary of Labor, on receiving a complaint alleging misuse of CETA funds, "shall" determine the truth of the allegations "not later than 120 days after" receipt of the complaint. In *Regions Hospital*, a Medicare statute provided that the Secretary of Health and Human Services "shall" report to specified congressional committees no later than December 31, 1987 regarding the methodology for reimbursing hospitals for graduate medical education. This

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prospective relief under Prison Litigation Reform Act "shall" operate as automatic stay of prior decree from 30 days of filing of motion).

Court ruled that the government's failure to comply with the statutory time periods did not deprive the agencies of the authority to act. Whatever other arguments respondents may make about these decisions, they establish at minimum that the word "shall" in Section 9706(a), even if "mandatory," is not by itself sufficient to terminate the Commissioner's authority to assign Combined Fund beneficiaries after September 30, 1993.

II. THE COAL ACT DOES NOT "SPECIFY A CONSEQUENCE" FOR THE COMMISSIONER'S FAILURE TO COMPLETE THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993.

Respondents' efforts to distinguish the *Pierce County* line of cases are unsuccessful. They contend that the statutes at issue in those cases involved law enforcement, applied to a "broad range of cases" rather than a "one-time activity," and did not deal with a "comprehensive and date-laden scheme." Bellaire Br. 28-33; Peabody Br. 39-44. None of these asserted distinctions explains why the October 1, 1993 date in the Coal Act should be accorded a legal status different from the dates or time periods involved in the cases cited by the Trustees and the Commissioner. As this Court explained in *James Daniel Good*, "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." 510 U.S. at 63. The Coal Act does not specify that any Combined Fund beneficiaries not assigned before October 1, 1993 must remain forever unassigned, and, in the absence of such a statutory specification, the courts should not imply one.

Judge Friendly's discussion in *St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41-46 (2d Cir. 1985), is instructive. Prefiguring this Court's decision the following year in *Pierce County*, and disagreeing with earlier contrary rulings by the Third and Ninth Circuits, the Second Circuit

cited numerous cases, including several from this Court, that recognized the "great principle of public policy" that public interests should not be prejudiced by "the negligence of the officers or agents to whose care they are confided." *Id.* at 42 (quoting *United States v. Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). The court emphasized that "[t]he legislature will not be deemed to have departed from this policy unless it clearly says so." *Id.*[2/]

Contrary to respondents' submissions, therefore, it is not enough that Congress created two categories of Combined Fund beneficiaries, assigned and unassigned. If the Commissioner's failure to complete the assignment process before October 1, 1993 was thereafter to deprive the Commissioner of all authority to assign beneficiaries who could and should have been assigned under the statute's substantive criteria, it was incumbent on Congress to say so. Congress made no such statement, nor would it have had any reason to adopt such an approach. Under respondents' scheme, *fewer* beneficiaries would have their health care financed by specific former employers, and *more* beneficiaries would have their health care financed out of public funds earmarked by statute for another purpose

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2/ *See also French v. Edwards*, 80 U.S. (13 Wall.) 506, 511 (1871):

> There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated.

entirely. *James Daniel Good*, *Pierce County*, and similar decisions teach that such a consequence detrimental to public interests should not be implied from agency delay but must be "specified" by Congress. To "specify" is to "state explicitly,"[3/] and the Coal Act contains no such explicit statement.

III. COMPLETION OF THE ASSIGNMENT PROCESS BEFORE OCTOBER 1, 1993 WAS NOT ESSENTIAL TO THE PROPER FUNCTIONING OF THE COAL ACT.

Respondents attempt to argue (Bellaire Br. 24-25; Peabody Br. 23-25) that completion of all initial beneficiary assignments before October 1, 1993 was indispensable to proper operation of the statutory scheme. That is plainly not so, as actual experience under the Coal Act has shown.

All Combined Fund beneficiary assignments—whether initial assignments made before October 1, 1993, initial assignments made on or after October 1, 1993, revised assignments following a successful administrative appeal under Section 9706(f)(2), or revised assignments necessitated by this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)—are effective February 1, 1993, the beginning of the Combined Fund's first plan year. Health care premiums are assessed against assigned operators for the plan year beginning February 1, 1993 and for each plan year thereafter. If and when there is a change in the operator to which a beneficiary is assigned, or a previously assigned beneficiary becomes unassigned (as a result of an administrative appeal, for example), or a previously unassigned beneficiary becomes assigned, adjustments to

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3/ American Heritage Dictionary of the English Language 1240 (New College ed. 1976).

premium assessments are made going back to February 1, 1993.

Each assigned operator's annual premium statement, mailed in October of each year, not only assesses premiums for the plan year then just beginning but also revises the premium assessments for all prior years and reflects appropriate credits or additional billings based on all changes since the previous statement. As the Fourth Circuit recognized in *Holland v. Pardee Coal Co.*, 269 F.3d 424, 434 (4th Cir. 2001), *cert. pending*, No. 01-1366 (docketed Mar. 18, 2002), "the Combined Fund uses an accounting method called 'inception billing,' which annually adjusts for the retroactive effects of adjusted beneficiary assignments." This procedure enables the Combined Fund Trustees to give full effect to all of the Commissioner's beneficiary assignments, including initial assignments made on or after October 1, 1993.[4/]

Apparently recognizing that the Combined Fund's actual experience belies any suggestion that completion of all initial assignments before October 1, 1993 was indispensable to the Coal Act's operation, Bellaire resorts to a series of labels that allegedly describe the date's role in the statutory

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4/ Bellaire's own example—that of Mrs. Saylor—confirms the point. *See* Bellaire Br. 26-27. Before her death in September 1994, Mrs. Saylor received health coverage from the Combined Fund during the Fund's first two plan years. At that time, Mrs. Saylor was an unassigned beneficiary, and her health care was financed from the first two of the three statutorily mandated $70 million annual transfers from the UMWA 1950 Pension Plan to the Combined Fund. *See* 26 U.S.C. § 9705(a). Thereafter, when Mrs. Saylor was assigned to Bellaire, Bellaire was assessed health care premiums for the two plan years during which Mrs. Saylor received benefits from the Combined Fund, and the Combined Fund adjusted its accounting so that the Pension Plan transferred amounts previously used for Mrs. Saylor's health premiums would be available to defray the premiums of other unassigned beneficiaries.

scheme. The Coal Act is said to be "a chrono-centric statute," and October 1, 1993 allegedly "sits at the crossroads" and "holds the pivotal position" among all other dates and schedules. Bellaire Br. 13, 24. These empty phrases smack of numerology. The frequency or prominence of a date's mention in a statute does not in some mysterious way limit an agency's authority to act. The question remains one of congressional intent, and this Court has held that any such restriction on an agency's power to perform its statutory tasks must be clearly expressed. *See, e.g., General Motors Corp. v. United States*, 496 U.S. 530, 542 (1990) ("In the absence of a specific provision suggesting that Congress intended to create an enforcement bar, we decline to infer one."). The Coal Act nowhere prohibits the Commissioner from completing the initial assignment process after September 30, 1993.

IV. RESPONDENTS' EFFORT TO DERIVE SUPPORT FROM OTHER PROVISIONS OF THE COAL ACT IS WITHOUT MERIT.

Respondents claim that several provisions of the Coal Act outside of Section 9706(a) support their argument that the Commissioner lacked authority to make initial beneficiary assignments after September 30, 1993. They rely, for example, on the Commissioner's statutory authority to make revised beneficiary assignments after successful administrative appeals; on the provisions for adjustments to the "applicable percentage" reflecting each assigned operator's share of the total number of assigned beneficiaries; and on the lack of any provision for assigning Combined Fund beneficiaries to a second assigned operator if the original assigned operator (and each of its related persons) goes out of business. None of these features of the Coal Act supports respondents' position.

A. The Commissioner's Reassignment Authority Under Section 9706(f)(3) Does Not Preclude Initial Assignments After September 30, 1993.

Peabody argues that, because Section 9706(f) authorizes SSA to reassign beneficiaries after successful administrative appeals, and because such reassignments necessarily would occur after October 1, 1993, there is a negative implication that Congress intended to preclude SSA from making initial assignments on or after October 1, 1993. Peabody Br. 32. The argument is a non sequitur. If Section 9706(f)(3) has any bearing at all, it shows that Congress had an overriding interest in getting the beneficiary assignments right, and was prepared to permit SSA to continue the process well beyond October 1, 1993 to serve that end.

The relevant provision says that, if an assignment has been found to be in error, "the Commissioner shall review the beneficiary's record for reassignment under subsection (a)." 26 U.S.C. § 9706(f)(3)(A)(ii). Peabody's argument posits that Congress wanted to correct erroneous assignments however long the process took, but that, at the same time, Congress wanted to leave some beneficiaries permanently unassigned however clear it became that that classification was erroneous under the statutory criteria. Peabody offers no sensible explanation for this dichotomy, and none can be found in the statute.

There is still a further point about Section 9706(f)(3). It refers to "reassignment under subsection (a)," in a context where it is clear that any reassignment would be made after October 1, 1993. Elsewhere, however, respondents contend that any reference to assignments under Section 9706 or 9706(a) necessarily means assignments made before October 1, 1993. *See, e.g.*, Bellaire Br. 20. Section 9706(f)(3) shows that statutory references to assignments "under Section 9706"

do not imply the temporal limitation that respondents advocate.

B. The Coal Act's Provision For Adjustment Of The Applicable Percentage Under Section 9704(f)(2) Does Not Imply That SSA Is Prohibited From Making Initial Assignments After September 30, 1993.

Section 9704(f)(1) of the Coal Act defines the statutory phrase "applicable percentage." The phrase refers to a fraction in which the numerator is a given operator's number of assigned beneficiaries, and the denominator is the total number of assigned beneficiaries (determined on the basis of assignments as of October 1, 1993). The "applicable percentage" is used in computing each operator's pro rata share of any death benefit premium assessed under Section 9704(c) and any unassigned beneficiaries premium assessed under Section 9704(d).

Section 9704(f)(2) provides for annual adjustments to the applicable percentage to take account of changes in beneficiary assignments as a result of the administrative appeals process or as a result of assigned operators (and their related persons) going out of business. Respondents contend that these two grounds for annual adjustments are necessarily exhaustive, that therefore there can be no adjustments for initial beneficiary assignments made after October 1, 1993, and that therefore any such initial assignments must be precluded by the statute. Bellaire Br. 21-22; Peabody Br. 32-35. The argument is misguided.

All Combined Fund beneficiary assignments, whether initially made before or after October 1, 1993, are made as of that date (indeed, as of February 1, 1993, for purposes of first-year premiums). Thus, whenever and for whatever reason beneficiary assignments are made or altered after October 1, 1993, the resulting assignments are made "as of October 1, 1993," and the changes are incorporated into the

calculation of the applicable percentage. The specific adjustments mentioned in Section 9704(f)(2) simply confirm that the applicable percentage is not static but is subject to annual adjustment based on intervening events.

When, for example, the Commissioner declared several thousand beneficiary assignments void as a result of this Court's decision in *Eastern Enterprises* and subsequently reassigned some of those beneficiaries to other operators, the changes were reflected in the computation of the applicable percentage. This in turn affected the proper allocation of the three $70 million transfers from the 1950 Pension Plan during the Combined Fund's first three plan years and resulted in a supplemental assessment against the remaining assigned operators. These adjustments were made even though Section 9704(f) makes no reference to the possible need for adjustments based on a constitutional ruling of this Court. The Eleventh Circuit has sustained the Trustees' supplemental assessments after *Eastern*. *See Apogee Coal Co. v. Holland*, No. 01-13691, 2002 WL 1491641 (11th Cir. July 12, 2002) ("The Coal Act explicitly contemplates that certain changes in assignments will be made from time to time over the history of the Combined Fund, and requires that premiums be recalculated retroactively to plan year 1993 to reflect such changes.").

Respondents' argument, which relies on the "expressio unius est exclusio alterius" maxim of statutory interpretation, is not an appropriate inference from congressional silence where, as here, the inference is contrary to textual and contextual evidence of congressional intent. *See Burns v. United States*, 501 U.S. 129, 136-37 (1991); *see also Clinchfield Coal Co. v. Federal Mine Safety and Health Review Comm'n*, 895 F.2d 773, 779 (D.C. Cir. 1990) ("The difficulty of the [expressio unius] doctrine—and the reason it is not consistently applied—is that it disregards several other plausible explanations for an omission. The drafter (here

Congress) may simply not have been focussing on the point") (internal citations omitted). The expressio unius maxim is "an especially feeble helper in an administrative setting," as here, "where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Cheney R.R. Co. v. ICC*, 902 F.2d 66, 69 (D.C. Cir. 1990) (citing *Clinchfield Coal*, 895 F.2d at 779).

C. The Designation Of Beneficiaries As Unassigned After Their Assigned Operator Has Gone Out Of Business Does Not Indicate That SSA Was Barred From Making Initial Assignments After September 30, 1993.

Peabody argues that, because the Coal Act does not provide for *reassignment* of Combined Fund beneficiaries whose original assigned operator has gone out of business (and indeed Section 9704(f)(2)(B) confirms that the statute does not contemplate such reassignments), Congress must have intended to terminate the initial assignment process by September 30, 1993. Peabody Br. 32. Once again, the inference that Peabody attempts to draw does not follow either logically or from the statutory scheme. That Congress chose not to provide for the reassignment of beneficiaries once correctly assigned to a now-out-of-business operator says nothing about whether Congress wanted the initial assignment process to proceed to completion, even if it extended beyond September 30, 1993. The provision could just as easily imply, as the Trustees have argued, that Congress wanted to ensure that there was one *valid* initial assignment for as many Combined Fund beneficiaries as possible and that thereafter the statutory scheme would run its course, without any "second" assignments. This view is supported by Section 9706(f)'s authorization of as many appeals and reassignments as might be needed to get a particular beneficiary's assignment right.

D. The Failure Of The Rockefeller Amendment Does Not Indicate That The Congress That Enacted The Coal Act Intended The October 1, 1993 Date To Be Jurisdictional.

The Coal Act's historical context and legislative history leave no doubt that "unassigned beneficiaries" were meant to be only Combined Fund "orphans," *i.e.*, beneficiaries that were not assignable under Section 9706(a)'s substantive criteria. Congress sought in the statute to resolve the key problem that undermined the collectively bargained multiemployer health care system, namely, a majority of beneficiaries having no employment connection with any of the contributing employers. Accordingly, Congress arranged to assign as many retirees as possible to specific former employers, and thus to minimize the number of unassigned beneficiaries whose health care would need to be financed by alternative means.

Finding no legitimate way to rebut this reading of the Coal Act and its historical background, Bellaire suggests that Senator Rockefeller's failed effort to amend the Coal Act in 2000 to eliminate the phrase "before October 1, 1993" from Section 9706(a) somehow supports Bellaire's interpretation. Bellaire Br. 40. As Bellaire itself observes, however, legislative activity subsequent to a statute's enactment forms "an unreliable basis for discerning the intent of an earlier Congress." Bellaire Br. 41; *Consumer Prod. Safety Comm'n v. GTE*, 447 U.S. 102, 118 n.13 (1980) ("[S]ubsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.").

This is especially so when the later legislative activity involves an unenacted amendment. As this Court has explained, "it is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law." *Pension*

Benefit Guar. Co. v. LTV Corp., 496 U.S. 633, 650 (1990). Inaction by Congress lacks "'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Id.*

V. RESPONDENTS' PROFFERED POLICY JUSTIFICATIONS FOR THEIR INTERPRETATION OF THE COAL ACT ARE BOTH UNSUPPORTED AND INSUPPORTABLE.

Respondents purport to discern in the Coal Act a legislative plan to provide assigned operators with certainty regarding the extent of their statutory obligations, to do "rough justice" rather than engage in an extended beneficiary assignment process, to avoid annual recalculations of premium assessments, and generally to protect operators at the expense of the AML Fund. This is sheer fiction. Nothing in the text of the statute, its avowed purpose, its historical background, or its legislative consideration supports the alleged objectives that respondents would read into the Coal Act.

More than 150 years ago, this Court counseled that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849). The Court has repeated this injunction "[o]ver and over" in the ensuing years. *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993), quoted in *Regions Hospital*, 522 U.S. at 460 n.5. *See also, e.g., Weinberger v. Hynson, Westcott & Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.")).

Viewed from this perspective, the interpretation here advocated by the Commissioner and the Trustees is much superior to that advanced by respondents.

Bellaire contends that Congress sought to avoid an assignment process "laden with risk of uncertainty for beneficiaries and operators alike." Bellaire Br. 25. Bellaire never identifies just what this risk is, and its assertion that an extended assignment process would pose a risk to beneficiaries is directly at odds with respondents' mantra that all Combined Fund beneficiaries will receive their intended health benefits regardless of the outcome of this dispute. Moreover, Bellaire finds no support for its theorizing anywhere in the Coal Act's text or legislative history. Bellaire criticizes the Trustees' reliance on the Coal Act's overarching purpose and legislative history on the ground that this approach might elevate the views of a few legislators over the collective view of Congress, especially given the controversial nature of the Coal Act. Bellaire Br. 39-40. The criticism rings hollow because, despite the extensive debate and compromise, Bellaire cannot point to even one comment by one legislator (or even one lobbyist) to show that certainty and repose for coal operators were ever a concern. By contrast, the Trustees' policy arguments are well-supported by the Coal Act's text, legislative history, and historical context.

Nor can respondents muster any argument that they were prejudiced in any way by the date of the assignments at issue. They are being asked to pay only what Congress intended them to pay, and not a penny more. *See Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 935 F.2d 1263, 1267-68 (Fed. Cir. 1991) (Newman, C.J., concurring) (the distinction between mandatory and directory statutory provisions "turns on whether the manner or time of performing the act is so critical to the statutory subject matter that any deviation can 'injuriously affect' the rights of

interested persons"); 3 NORMAN J. SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 57:18, at 58-59 (6th ed. 2001) ("The general rule is that if a provision of a statute states a time for performance of an official duty, without any language denying performance after a specified time, it is directory," unless "the time period is provided to safeguard someone's rights . . . .").

Bellaire alleged in its Complaint that SSA's assignments made after September 30, 1993 "caused [Bellaire] to incur premium obligations and other expenses and harm that it would not have incurred if the Commissioner had properly performed his duties under Section 9706 of the Coal Act." J.A. 86, ¶ 64. Bellaire never adduced any evidence in support of this allegation, however, and there is none. Bellaire is being asked to pay the exact same amount today that it would have been asked to pay if SSA had made all of the initial assignments before October, 1, 1993. Thus, there appears "no need to provide [coal operators] with any remedy at all—much less the drastic remedy respondents seek in this case" for SSA's failure to meet the statutory date. *Pierce County*, 476 U.S. at 260 n.7.

Holding that the October 1, 1993 date is not jurisdictional does not sanction an endless assignment process. Bellaire Br. 25. If for some reason Bellaire had a perceived need to know by a time certain the total number of beneficiaries who eventually would be assigned to it, it could have petitioned a court to "compel agency action unlawfully withheld or unreasonably delayed" under the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(1). *Pierce County*, 476 U.S. at 260 n.7. Indeed, "the 'proper remedy' of a party seeking to enforce a statutory deadline is not to challenge the legitimacy of post-deadline agency actions, but 'to apply for a court order compelling the [agency] to act.'" *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991) (quoting *Fort*

Worth Nat'l Corp., v. FSLIC, 469 F.2d 47, 58 (5th Cir. 1972)).[5]

By stating that SSA's notices of assignment did not distinguish between initial assignments and reassignments (Bellaire Br. 9-10), Bellaire appears to imply that it did not seek relief under the APA because it was unaware that some of the beneficiaries assigned in 1995 were initial assignments. Bellaire does not contend, however, that it did not, in fact, receive information during the appeals process that should have put it on notice that some of the beneficiaries were initial assignments. Nor does Bellaire explain why it was able to compile a list for the Complaint that identified persons believed to be assigned after the statutory date, but was unable to access such information in 1995. J.A. 83-84, Compl., ¶ 60. Bellaire does not dispute that, upon request, SSA would have disclosed whether an assignment was an original assignment or a reassignment. J.A. 138, Answer of Def. Apfel ¶ 61. If Bellaire ever had made such inquiries, it could have taken early advantage of the APA procedure to protect any legitimate interest it might have had in certainty and finality.[6]

5/ Notably, decisions addressing whether to compel agency action after a statutory date do not question the agency's authority to act after that date. *E.g., Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (directing agency that had missed statutory deadline to comply "as soon as possible"); *Environmental Def. Ctr. v. Babbitt*, 73 F.3d 867 (9th Cir. 1995) (where EPA missed one-year deadline for listing endangered species, directing agency to make final determination within a reasonable time after appropriated funds were made available); *In re Barr Labs.*, 930 F.2d at 74 (refusing to enforce 180-day deadline on FDA's processing of generic drugs).

6/ Elgin's *amicus* brief consists largely of inappropriate factual contentions that are unsupported in the record and that cannot be judicially noticed. Elgin Br. at 2-8; *see Werner v. Werner*, 267 F.3d 288, 295 (3d Cir. 2001) (refusing to judicially notice truth of a memorandum). Elgin suggests that SSA would withhold or delay disclosing information

VI. AT MINIMUM, THE COMMISSIONER'S INTERPRETATION OF SECTION 9706(a) IS ENTITLED TO DEFERENCE.

Even if all of the foregoing arguments, and this Court's own prior decisions on the effect of statutorily prescribed dates, are insufficient to *require* a ruling in favor of the Commissioner, they demonstrate at minimum that the statutory language is ambiguous and that the Court should defer to the interpretation of the Commissioner, the officer charged by statute with the task of assigning Combined Fund beneficiaries. This Court has not limited *Chevron*-deference to regulations passed pursuant to an agency's rule-making authority. *See* cases cited in Trustees Br. 48 n.39. But even if the less deferential *Skidmore* standard applies, SSA's interpretation of the Coal Act should be upheld. *See United States v. Mead Corp.*, 533 U.S. 218, 237-38 (2001) (level of deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), depends on the agency's care, consistency, formality, relative expertness, and persuasiveness of agency's position).

Bellaire asserts, as if it were uncontested fact, that at some point in 1995 the Commissioner changed her position about SSA's ability to make initial beneficiary assignments after September 30, 1993. Bellaire then declares that "[t]o this day no explanation has been given why the agency's interpretation of the law changed in 1995." Bellaire Br. 42. No explanation was needed, because no "change" occurred. SSA never adopted the position that it was precluded from making initial assignments on or after October 1, 1993. Bellaire cites a snippet from congressional hearing testimony

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that would clarify when each assignment was made. Elgin Br. 3-4. The only evidence in the record is to the contrary. *See* J.A. 28-47 (SSA's response to Peabody's request for information). In any event, Elgin's purported grievance does not bear on the statutory interpretation issue before the Court.

in September 1993 in which Acting Commissioner Lawrence H. Thompson stated that he expected SSA to complete the assignment process by the "statutory due date" of October 1, 1993. Bellaire Br. 9, 42-43. This appears to be no more than an overly optimistic forecast to Congress, not a statement of SSA policy. It also is not consistent with other information—that "[e]xtra resources would be needed to complete the assignments by the October 1, 1993 target date"—that the agency communicated to the House Ways and Means Committee at about the same time. Trustees Br. 16. The Acting Commissioner's subsequent statement in 1995 that the initial assignment process had been completed by October 1, 1993, also is not an agency policy statement and does not address the issue in this case. It does not say that SSA would not make any more initial assignments if the agency was able to do so.

The history of SSA's interpretation is explained in the Declaration of Richard Harron, Director of the Division of Coverage and Support for SSA (J.A. 179-84), and it does not involve any change of position. In November 1992, the Trustees of the 1950 Benefit Plan and the 1974 Benefit Plan compiled a list of approximately 86,000 miners who were identified as eligible for assignment under the provisions of the Coal Act. SSA was required to perform the massive task of reviewing the records and matching the miners with appropriate companies under Section 9706's criteria. J.A. 180-81, ¶¶ 3-4. By September 30, 1993, SSA had made an initial determination that 20,005 miners could not properly be assigned to specific operators based on information available at that time. Because SSA recognized that many of the unassigned beneficiaries could be assigned, however, it continued to work on implementing the Coal Act after October 1, 1993. J.A. 182, ¶¶ 6- 7.

In November 1993, the Combined Fund informed SSA that a random sampling of unassigned miners showed

that many properly could be assigned to specific coal operators. SSA determined that the employment histories of the initially unassigned miners should be reviewed, but the agency's workload resources at that time had to be directed to responding to the numerous appeals. Due to technology issues, SSA could not begin reviewing the initially unassigned miners until 1995. In June and September 1995, SSA sent notices of assignment regarding previously unassigned miners to various coal operators. J.A. 183-84, ¶¶ 8-9.

The decision to continue making initial assignments after September 30, 1993 was based on SSA's "understanding that Congress intended SSA to assign the greatest number of miners to appropriate coal operators and to limit, as much as possible, the number of unassigned beneficiaries." J.A. 182, ¶ 7. This is a more than reasonable interpretation of the Coal Act, which SSA consistently has applied.

Under Bellaire's unreasonable view, SSA could make reassignments based on new information submitted during the appeals process, for example, but was required to ignore such new information about beneficiaries whom SSA had not been able previously to assign. Such an interpretation would artificially inflate the number of Combined Fund orphans. The Coal Act's text, structure, legislative history, and historical context all point to a contrary intent. As the Fourth Circuit concluded in *Pardee,* "Congress intended the status of individual beneficiaries to depend not on the vicissitudes of bureaucratic action, but instead on the merits, i.e., whether an extant operator could be identified and held responsible." 269 F.3d at 437.

CONCLUSION

For these reasons, and those set forth in the Trustees' opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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July 22, 2002